IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 24, 2008 Session

JAMES L. FERGUSON, ET AL. v. JOHN F. JENKINS

Appeal from the Law Court for Washington County
No. 22131 Jean A. Stanley, Judge

No. E2007-02501-COA-R3-CV - FILED NOVEMBER 20, 2008

The issue in this case is whether the trial court erred in awarding interest against an uninsured motorist ("UM") insurer that resulted in an award in excess of the applicable UM coverage limits. After careful review, we hold that the trial court erred in awarding prejudgment interest to the insured under the circumstances and reverse the prejudgment interest award. The trial court's award of postjudgment interest from the time that the trial court entered an order awarding the insured $50,000, the policy limit of UM coverage after offsetting a prior $50,000 settlement with the tortfeasor's insurer, until the date the insurer paid the policy limit, is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Law Court Reversed in Part and Affirmed in Part; Case Remanded

SHARON G. LEE, SP. J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

K. Jeff Luethke, Kingsport, Tennessee, for the Appellant, Consumers Insurance Company.

Robert J. Jessee, Johnson City, Tennessee, for the Appellees, James Ferguson and Jamie Ferguson.

OPINION

I. Background

This is the second time this case has been appealed to this court. The pertinent facts remain the same as in our first opinion, ***Ferguson v. Jenkins***, 204 S.W.3d 779 (Tenn. Ct. App. 2006) ("***Ferguson I***"), and so we will quote liberally from the ***Ferguson I*** opinion in the following factual background. James L. Ferguson and his wife, Jamie Ferguson, filed suit against John F. Jenkins ("the tortfeasor") to recover damages for personal injuries sustained by Mr. Ferguson when the

motorcycle he was operating was struck by the tortfeasor's vehicle. Mr. Ferguson served process upon his uninsured motorist carrier, Consumers Insurance Company ("Consumers"), on the theory that the policy of automobile insurance issued to him by Consumers afforded him uninsured motorist coverage. At the conclusion of a bench trial, the court held that the plaintiff was entitled to coverage under the uninsured motorist provisions of the Consumers policy. ***Ferguson I***, 204 S.W.3d at 781. Consumers appealed, arguing that the trial court erred in determining that the motorcycle he was driving was a "covered auto" under the policy.

This court affirmed on the first appeal, finding and holding as follows in pertinent part:

> The Declarations page of the Policy indicates that the policy covers "Jim Ferguson, Jim's 11E Auto Sales" and lists symbol "22" under the coverage for "Uninsured Motorist," providing coverage of $100,000.
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> * * *
>
> [Mr. Ferguson's] injuries resulted in medical bills in excess of $150,000.
>
> The plaintiff [Mr. Ferguson] filed a complaint against the tortfeasor on October 3, 2002, and caused process to be served on Consumers, as the plaintiff's uninsured motorist coverage carrier. Consumers answered the complaint, denying that the Policy afforded any coverage to the plaintiff with respect to the accident. The plaintiff eventually settled his claim against the tortfeasor for the latter's insurance policy limits of $50,000.
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> * * *
>
> Since we have determined that the motorcycle was a covered auto, as contemplated under the Policy, and that it was intended for resale, thus subjecting it to coverage under the Auto Dealers Garage Policy, the plaintiff is entitled to uninsured motorist coverage if his damages resulted from bodily injury sustained by him as the result of an accident with an "uninsured motor vehicle." Without question, the plaintiff suffered bodily injury as a result of his accident with the tortfeasor. . . . Because the tortfeasor's insurance policy limits were less than the plaintiff's limits under the uninsured motorist coverage section of the Policy, the tortfeasor's vehicle qualifies as an uninsured motor vehicle. There are no applicable exclusions in the Policy. Thus, the trial court correctly held that the Policy was applicable and that the plaintiff was entitled to coverage of $50,000 under the Policy, which amount represents the difference between the limits of the

> Policy and the amount the plaintiff received in settlement with the tortfeasor.

Ferguson I, 204 S.W.3d at 782-83, 787 (footnote omitted).

After remand, Mr. Ferguson filed a motion with the trial court on November 15, 2006, alleging as follows:

> That throughout these proceedings, the Defendant Consumers Insurance, by and through its attorney of record, represented to the Court and [Mr. Ferguson] that [he was] entitled to the sum of $50,000, representing the difference between the Defendant's uninsured motorist coverage, less the amount paid by the original Defendant [tortfeasor's] insurance carrier.
>
> That to date, [Consumers] has not tendered to [Mr. Ferguson] the $50,000 nor has there been a request for arbitration to determine damages pursuant to the uninsured motorist statutes for the State of Tennessee.
>
> Plaintiffs/Movants aver that they are entitled to prejudgment interest and discretionary costs.

The trial court entered an order on December 15, 2006, finding that a hearing on the motion had taken place on December 4, 2006, and that Consumers had failed to file a responsive pleading or to appear for the hearing. The trial court awarded Mr. Ferguson $50,000 plus $255.56 in discretionary costs and 10% prejudgment interest from October 27, 2004, the date of entry of the court's judgment ruling that Consumer's policy issued to Mr. Ferguson provided UM coverage in the subject accident, and postjudgment interest from the date of the order until the policy limit amount was paid.

On January 16, 2007, Consumers filed a motion "for relief from order" pursuant to Tenn. R. Civ. P. 60, arguing that its failure to respond to Mr. Ferguson's motion resulted from "excusable neglect due to a medical condition" and that the trial court's award of $50,000 plus discretionary costs and prejudgment interest was in error. That same day, Consumers tendered $50,000 to Mr. Ferguson, the amount of the policy limit for its UM coverage ($100,000) less an offset of the $50,000 paid to Mr. Ferguson by the tortfeasor's liability insurer. Following a hearing in July of 2007, the trial court entered its final order on October 10, 2007, holding that its prior order of December 15, 2006 "was proper and is hereby reaffirmed" in all respects.

II. Issue

Consumers appeals, raising the issue of whether the trial court erred in awarding Mr. Ferguson prejudgment interest, resulting in a judgment exceeding the applicable $50,000 policy limit for his UM coverage.

III. Analysis

There is no factual dispute in this case, and the issue presented is one of law. When there is no dispute as to any material fact, "the question on appeal is one of law, and our scope of review is *de novo* with no presumption of correctness accompanying the [trial court's] conclusions of law." ***Union Carbide Corp. v. Huddleston,*** 854 S.W.2d 87, 91 (Tenn. 1993).

It is clear that any award of interest prior to the trial court's December 15, 2006 order is an award of prejudgment interest because there was no monetary judgment against Consumers prior to that time. The trial court's order entered October 27, 2004, and subsequently affirmed by this court, determined only that the loss suffered by Mr. Ferguson while riding the motorcycle was covered by the UM provisions of his policy with Consumers. The 2004 order did not conclusively and finally adjudicate the issues of liability and Mr. Ferguson's damages, although it is apparent from the record that these items had not been seriously in dispute.

Consumers relies on the decisions of this court in ***Malone v. Maddox***, No. E2002-01403-COA-R3-CV, 2003 WL 465668 (Tenn. Ct. App. E.S., filed Feb. 25, 2003) and ***Thurman v. Harkins***, No. W2004-01023-COA-R3-CV, 2005 WL 1215959 (Tenn. Ct. App. W.S., filed May 25, 2005) in support of its argument that the trial court erred in awarding prejudgment interest resulting in a judgment exceeding the applicable limit of UM coverage of $50,000 pursuant to the policy. We agree that ***Malone*** and ***Thurman*** compel the conclusion that the trial court's award of prejudgment interest was erroneous.

In ***Malone***, the same issue as in the present case was squarely presented to this court, and we affirmed the trial court's ruling that "the policyholder's uninsured motorist carrier . . . cannot be held liable for prejudgment interest under the facts of this case because such an award would cause the total judgment against the UM carrier to exceed the UM coverage limit in the policy." ***Malone,*** 2003 WL 465668, at *1. The ***Malone*** court noted that prejudgment interest is defined at Tenn. Code Ann. § 47-14-123 as "an element of, or in the nature of, *damages*," ***Id.*** at *5, and further reasoned as follows:

> Contrary to the policyholder's assertion, there is no ambiguity in the policy pertaining to the issue of prejudgment interest. The UM coverage extends to "*all* damages." (Emphasis added). As we have previously noted, prejudgment interest, by the language of the applicable statute, is "an element of, or in the nature of, damages."

> Tenn. Code Ann. § 47-14-123. In the instant case, the UM carrier contracted to pay "all damages." Prejudgment interest is an element of damages. Therefore, prejudgment interest is covered by the language of the policy pertaining to that which can be recovered under the UM coverage.
>
> We reject the policyholder's argument that the language "all damages" does not include prejudgment interest . . . . Under the UM coverage, it is a part of the covered damages because "all damages" means just that, all damages, and, by statute, prejudgment interest is an element of the injured party's damages.

Id. at *5. In the instant case, the policy at issue similarly provides that regarding the UM coverage, "[t]he most we will pay for *all damages* resulting from any one "accident" is the limit of Uninsured Motorists Coverage shown in the Schedule." (Emphasis added).

Two years later, the ***Thurman*** decision applied and followed the ***Malone*** ruling when presented with UM policy language very similar to the language in both ***Malone*** and this case. The ***Thurman*** court stated as follows in pertinent part:

> The policy contains an additional provision limiting the amount Great River [the UM insurer] is obligated to pay: "[r]egardless of the number of covered 'autos', 'insureds', premiums paid, claims made or vehicles involved in the 'accident', the most we will pay for *all damages* is the limit of UNINSURED MOTORISTS COVERAGE shown in the schedule." (emphasis added). These limits are very similar to those at issue in ***Malone v. Maddox*** wherein this Court addressed this same issue. ***Malone***, 2003 Tenn. App. LEXIS 147, at *8, 2003 WL 465668.
>
> As this Court previously noted, pre-judgment interest is "an element of, or in the nature of, damages." Tenn. Code Ann. § 47-14-123 (2001); ***Malone***, 2003 Tenn. App. LEXIS 147, at *16, 2003 WL 465668. Because the policy on its face limits the amount Great River is required to pay for "all damages" in the event the uninsured/underinsured motorist coverage is triggered and pre-judgment interest is an element of damages, pre-judgment interest is encompassed by the limiting language of the policy. *See* ***Malone***, 2003 Tenn. App. LEXIS 147, at * 16, 2003 WL 465668.

> [W]e hold that the trial court did not err when it "capped" the amount of damages, including pre-judgment interest, pursuant to the limit stated in the policy.

Thurman, 2005 WL 1215959, at *5-6.

We are of the opinion that the circumstances presented here are indistinguishable from ***Malone*** and ***Thurman***, and that ***Malone,*** a decision of the Eastern Section of this court, is binding and controlling precedent. Because the operative policy language in this case provides that the cap for "all damages" is the UM coverage policy limit and prejudgment interest is included in "all damages," the trial court erred in awarding prejudgment interest resulting in a judgment in excess of $50,000 in this case. Mr. Ferguson cites the case of ***Gaston v. Tenn. Farmers Mut. Ins. Co.***, No. 2006-01103-COA-R3-CV, 2007 WL 1775967 (Tenn. Ct. App. E.S., filed June 21, 2007), in support of his argument, but we believe the ***Gaston*** case is of no avail to him because the court in that case affirmed an award in excess of the UM coverage limits pursuant to a claim brought under the Tennessee Consumer Protection Act ("TCPA"), not the insurance policy, ***Id.*** at *15, and there is no TCPA claim here.

Regarding the issue of postjudgment interest, however, the ***Malone*** court noted that "there are fundamental differences between postjudgment interest and prejudgment interest." ***Malone***, 2003 WL 465668, at *4. ***Malone*** further stated as follows regarding postjudgment interest:

> Postjudgment interest is mandatory. ***Vooys v. Turner,*** 49 S.W.3d 318, 322 (Tenn. Ct. App. 2001). It is imposed by statute, Tenn. Code Ann. § 47-14-121, "on judgments." Tenn. Code Ann. § 47-14-122 (2001) provides that such "[i]nterest *shall* be computed on *every* judgment . . . . (Emphasis added). Once the amount of the judgment has been established, it bears interest at the statutory rate of 10% "except as may be otherwise provided or permitted by statute." Tenn. Code Ann. § 47-14-121. If the exception does not apply, the statute makes the add-on of 10% interest mandatory; a court is without authority to relieve a debtor of its statutorily-mandated postjudgment interest obligation. ***Inman v. Inman,*** 840 S.W.2d 927, 931 (Tenn. Ct. App. 1992); ***Bedwell v. Bedwell,*** 774 S.W.2d 953, 965 (Tenn. Ct. App. 1989). As the ***Goff*** opinion holds, postjudgment interest is "in addition to the limits of coverage." ***Goff*** [***v. Permanent Gen. Assurance Corp.,*** No. 03A01-9405-CV-00185]***,*** 1994 WL 585771, at *2 [Tenn. Ct. App. E.S., filed Oct. 19, 1994].

Malone, 2003 WL 465668, at *5. In this case, the trial court awarded Mr. Ferguson $50,000, the amount of his UM coverage limit less the offsetting settlement with the tortfeasor, on December 15, 2006. Consumers paid $50,000 to Mr. Ferguson a month later on January 16, 2007. Because

"postjudgment interest is in addition to the limits of coverage," ***Id.***, we affirm the trial court's award of postjudgment interest for one month, beginning on December 15, 2006.

IV. Conclusion

The judgment of the trial court awarding prejudgment interest to Mr. Ferguson is reversed. The trial court's judgment is affirmed in all other respects. Costs on appeal are assessed one-half to the Appellant, Consumers Insurance Company, and one-half to the Appellees, James Ferguson and Jamie Ferguson.

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SHARON G. LEE, SPECIAL JUDGE